IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 09..12..2004

CORAM ::

THE HONOURABLE MR. JUSTICE N.V.BALASUBRAMANIAN

AND

THE HONOURABLE MRS. JUSTICE R. BANUMATHI

A.S.No.226 of 1990
and
C.M.P.No.15683 of 2004

1. Goundappa Gounder,(decd) S/o.Palani Gounder | Appeallants 2 & 3 who are the existing Appellants vide order dt.17.11.99 in CMPs 18840 to 18842/99.
2. Karuppaswamy, S/o.Gowndappa Gounder
3. Subramanian Gounder alias Subbiah Gounder, S/o. Palani Gounder

All residing at Thegani, a hemlet of Pachapalayam Village, Periakuvilai Post, Chettipalayam (Via) Palladam Taluk, Coimbatore District. .....Appellants / Defendants 1,3 and 4

- Vs -

1. Periammal (died)
2. V. Nangappa Gounder
3. Subbi Gounder
4. Valliappa Gounder
5. Devathal
6. Velathal .....Respondents / Plaintiff

L.Rs.2 to 6 have been brought on record as L.Rs of the deceased First Respondent vide order dated 17.11.1999 in C.M.P.Nos.18840 to 18842/1999

7. Pachiammal alias Mayilathal, W/o.Late Royappa Gounder, Thegani, Hamlet of Pachapalayam Village, Periakuyilai Post, (via) Chettipalayam, Palladam Taluk, Coimbatore District. .....Respondent / Second Defendant

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Appeal filed under Section 96 C.P.C against the Judgment and Decree dated 04.12.1989 of the Subordinate

Judge, Thiruppur in O.S.No.80/86, as stated therein.

For Appellants :: Mr. M. Kalyanasundaram
For Respondents:: Mr. K. Govi Ganesan

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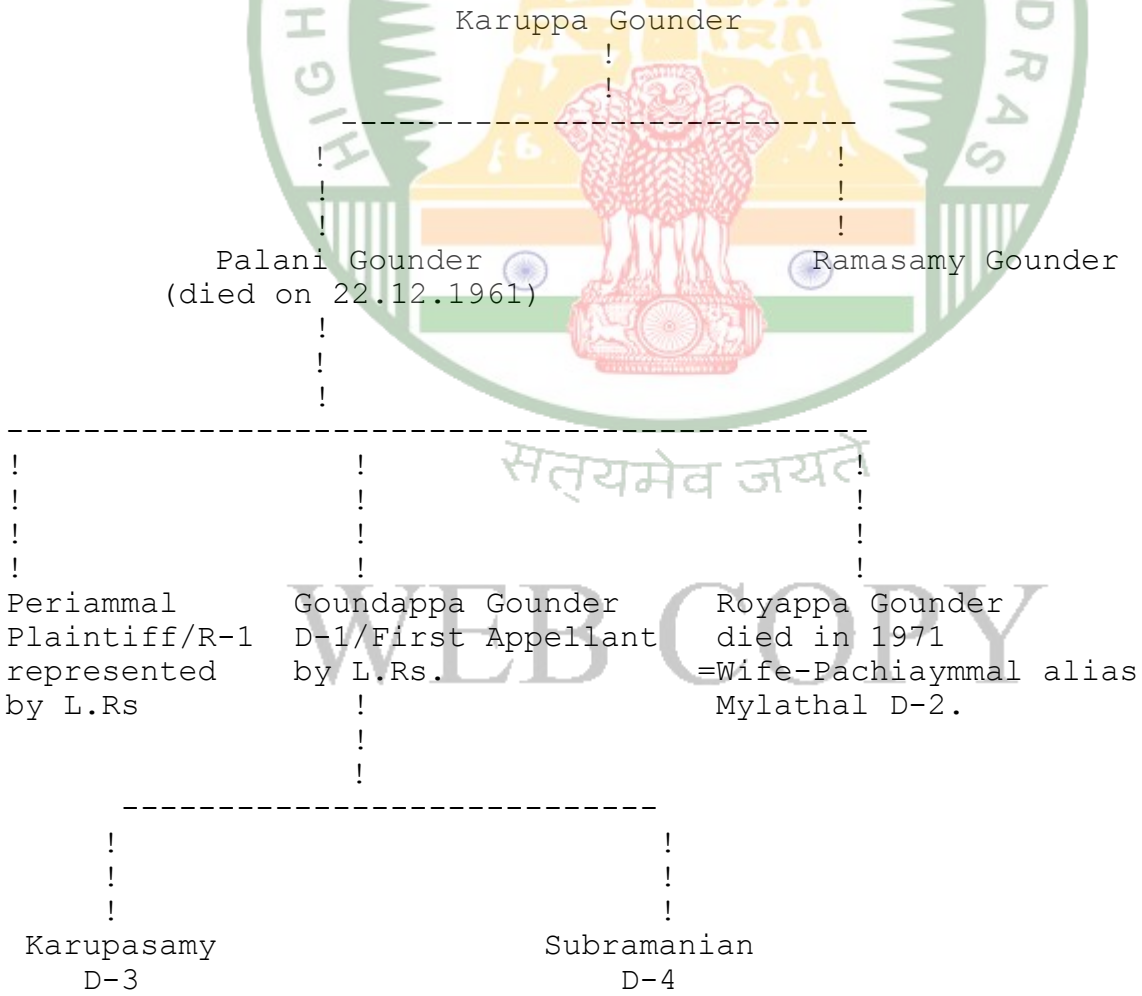
J U D G M E N T

R. BANUMATHI, J.

D-1, D-3 and D-4 in O.S.No.80 of 1986 on the file of Subordinate Judge, Thiruppur are the Appellants. This Appeal is directed against the Judgment and Decree(dated 04.12.1989) of the Sub-Judge, Thiruppur in O.S.No.80 of 1986, passing Preliminary Decree for partition of 1/9th share to the First Respondent / Plaintiff.

2. For convenience, parties would be referred to as they were arrayed in O.S.No.80 of 1986 on the file of Sub-Court, Thiruppur.

3. For better understanding of the claim of the Plaintiff, firstly, it is necessary to refer to genealogy of the Parties:-



Case of the Plaintiff is that Father-Palani Gounder and Brother – Ramasamy had no ancestral nucleus of properties; out of their separate, self-acquired funds, they purchased

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various properties. As per the partition, the Schedule mentioned properties were allotted to the share of Plaintiff's Father - Palani Gounder. All these suit properties are the self-acquired properties of Palani Gounder. Palani Gounder died intestate on 22.12.1961. As per the provisions of Hindu Succession Act, 1956, the Plaintiff and Defendants 1 and 2 have become entitled to a common 1/3rd share each in the suit properties and they are in joint possession of the same. While so, during last week of December 1985, the Plaintiff came to know that the Second Defendant has executed a Sale Deed dated 04.12.1985 in favour of Defendants 3 and 4 in respect of a common half share of the suit properties while she is entitled to only 1/3rd share thereon. The Sale is neither true nor valid nor binding on the Plaintiff. Claiming partition of 1/3rd share, the Plaintiff issued notice to the Defendants dated 18.12.1985 supplemented by another notice dated 30.12.1985, (Ex.A.5) calling upon them to effect the partition. D-1,D-3 and D-4 have received the Notice; D-2 refused to receive the same. None of the Defendants have sent any reply. Hence, the Suit for partition by the Plaintiff claiming her 1/3rd share in the suit properties.

4. Denying the averments in the Plaint that the suit properties are self-acquired properties of Palani Gounder, D-1 has filed elaborate Written Statement, claiming that all the suit properties are the ancestral properties of his Father Palani Gounder. According to the Defendants, all the suit properties are ancestral properties and not self-acquisition by Palani Gounder and his Brother-Ramasamy Gounder. The source of income for Palani Gounder and his Brother was only Agriculture. Palani Gounder and his Brother Ramasamy Gounder have divided the properties as per the Partition dated 23.05.1934 and in the said partition, the suit properties were allotted to the share of Palani Gounder. Palani Gounder died intestate on 22.12.1961. After the death of Palani Gounder, D-1 and his Brother- Royappa Gounder alone were in possession and enjoyment of the suit properties, enjoying half share each. They were in possession and enjoyment of the suit properties openly and continously from 22.12.1961 without any interruption and thereby, they have perfected their title to the suit properties by adverse possession and ouster. The Plaintiff lost the title to the suit properties by ouster and adverse possession and hence, she is not entitled to the suit properties. The Plaintiff is bound by the Sale Deed dated 04.12.1985.

5. Reiterating the same averments in the Written Statement filed by D-1, D-3 has also filed the Written Statement. Contention of the Third and Fourth Defendant is that they have purchased half share from the Second Defendant for valid consideration by the Sale Deed dated 04.12.1985 and the Plaintiff is bound by the Sale Deed.

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6. On the above pleadings, five issues were framed in the Trial Court. Issue No.1 was framed as, "*Whether the*

suit properties are the self-acquired properties of Palani Gounder?". Learned Subordinate Judge referred to Ex.D.1 – Sale Deed in favour of Karuppa Gounder and that the same was succeeded by his Sons Palani Gounder and Rayappa Gounder. Further pointing out that the family of Palani Gounder had no other avocation in life excepting Agriculture, learned Subordinate Judge found that the suit properties are the ancestral properties of Palani Gounder. Finding that the suit properties are not the self acquisition of Palani Gounder, Issue No.1 was answered against the Plaintiff. Palani Gounder died interestate on 22.12.1961. He has neither left any Will or Family arrangement. Hence the Plaintiff is entitled to 1/9th share (1/3 x 1/3). Accordingly learned Subordinate Judge has rightly found that the Plaintiff is entitled to 1/9th share. Regarding this aspect, there is no cross-objection by the Plaintiff.

7. Issue No.3 was framed on the plea of Ouster – *Whether the Plaintiff has been ousted from the enjoyment of the suit properties and whether Defendants 1 and 2 have perfected their title by adverse possession.* The burden of proof of plea of ouster is cast upon the Defendants, which they were found to have not established. Hence, the plea of ouster set forth by the Defendants was rejected by the Trial Court.

8. Aggrieved over the same, Defendants 1,3 and 4 have preferred this Appeal. Learned counsel for the Appellants submitted that the Trial Court has not properly appreciated that the Plaintiff was excluded from the possession of the suit property. Further, contending that the Plaintiff was given in marriage long ago and that she never shared the income of the family properties and that the plea of ouster is well established, he has submitted that the Trial Court is erred in rejecting the same. In support of the contention, onbehalf of the Defendants, C.M.P.No.15683 of 2004 (O.41 R.27 C.P.C) has been filed to receive the Kist Receipts as additional documents. Contending that the Kist Receipts were not traceable during the Trial, learned counsel for the Appellants submitted that the Kist Receipts are public documents and are necessarily to be admitted. It is further submitted that if the additional documents produced by the Defendants are received in evidence, which would establish the long and continuous possession of the Defendants.

9. Countering the arguments of the Appellants and objecting receiving of additional documents, learned counsel for the Respondents / Plaintiff has submitted that in the Trial Court, the Defendants have not discharged the burden cast upon them to prove that they were in exclusive possession of the suit properties. Taking strong objection for allowing of the Petition filed under O.41 R.27 C.P.C, learned counsel further submitted that even if the Kist Receipts are received, the same would not convincingly

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establish the ouster.

10. We have carefully considered the submissions of both sides and perused the Judgment of the Trial Court, evidence and other materials on record. In such consideration, the point that arises for our consideration is :- "Whether the Appellants have established the plea of ouster and whether the Plaintiff was excluded from the possession of the family properties?".

11. To elaborate upon the plea of ouster among the co-sharers, onbehalf of the Defendants, reliance is placed upon the decision reported in VIDYA DEVI ALIAS VIDYA VATI (DEAD) BY L.Rs ..VS.. PREM PRAKASH AND OTHERS (1995 (4) S.C.C. 496), in which case, plea of ouster among the co-sharers has been elaborately dealt with by the Supreme Court. We may firstly refer to the following :-

> ""Adverse Possession" means hostile possession, that is, a possession which is expressly in denial of the title of the true owner. The denial of title of the true owner is a sign of adverse possession.
>
> In order that the possession of co-owner may be adverse to others, it is necessary that there should be ouster or something equivalent to it. "Ouster" does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner."

In the light of the above, we are to consider whether the claim of title by Adverse Possession pleaded by the Defendants is proved.

12. At the time of filing the suit, the Plaintiff-Periyammal was aged 70 years. Even during life time of her father, she was given in marriage. After the death of her Father in 1961, her husband also died after ten years. According to the Plaintiff, after the death of her Husband, she had been living with her Brothers / D-1 and Royappa Gounder in the family house and was in joint enjoyment of the family properties left by her father Palani Gounder. Relevant portion of the evidence of P.W.1 is as noted below:-

> "....என் தகப்பனார் இறந்த பிறகு சுமார் பத்து வருடம் கழித்து என் கணவர் இறந்தார். என் தகப்பனார் இறந்தபிறகும் நான், என் கணவர், என் சகோதரர் எல்லோரும் ஒரே வீட்டில் வசித்து வந்தோம்..."

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Further, Plaintiff has stated that she has been allotted 8 acres of land in the family arrangement and that she has been

cultivating the same.

13. According to the Appellants, they have perfected title by long and continuous possession and by adverse possession. Further case of the Appellants is that the Plaintiff has never shared the income from the suit properties. It is well settled that the onus of proving ouster is upon those who set up adverse possession. It is well settled that as between co-owners there can be no adverse possession by one co-owner, unless there has been a denial of title and ouster to the knowledge of the other.

14. In the light of the above, we have carefully considered whether the Defendants have established the plea of ouster. To establish the plea of ouster, onbehalf of the Defendants in the Trial Court only Ex.B.3 was filed. Ex.B.3 is Patta No.584 for fasli 1395 (for the year 1986) issued in January 1986. In Ex.B.3, only name of D-1 and name of some others are mentioned. The Second Defendant's name Pachiyammal alias Mayilathal is not found. We may at once refer to Ex.A.4-Patta filed by the Plaintiff regarding Patta No.584. As per Ex.A.4, the Patta No.585 stands in the name of:-

"....பழனிக்கவுண்டர் மகன் கவுண்டப்ப கவுண்டர்... ராய கவுண்டர் மனைவி பேச்சியக்காள்... வெங்கிடாசலக் கவுண்டர் மனைவி பெரியம்மாள்..."

Mention of the Plaintiff's name as joint pattadar in the patta is evidence of unimpeachable character showing the joint possession of the family properties by the Plaintiff and that there could not have been ouster.

15. Before the Trial Court, D.Ws.1 and 2 / D-1 and D-2 have been examined, who deposed stating that the Plaintiff was excluded from the possession and enjoyment of the family properties and that the Defendants have spent huge amount in improving the suit properties. D-2 has stated that she has been in exclusive possession of her half share and that she sold the same to D-3 and D-4 and that D-3 and D-4 are in enjoyment of half share of the suit properties. Learned Trial Judge found that the evidence of D.Ws.1 and 2 and Ex.B.3 would not satisfactorily establish the ouster between the co-sharers.

16. C.M.P.No.15683 of 2004 :-

Challenging that finding, onbehalf of the Appellants, this Petition is filed under O.41 R.27 C.P.C to receive 24 Kist Receipts as additional documents. Under O.41 R.27 C.P.C, the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. Under O.41 R.27(1)(aa) C.P.C when application is made on the last stage, to put in evidence one of the prime duties on the applicant is to show that it was owing to no want of diligence on their part and that the matter could not be discovered before that.

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17. In the affidavit filed along with the Petition, no averments are made that despite reasonable search, the documents could not be traced. In the Affidavit, the Appellants have only averred that the Kist Receipts have been omitted to be filed before the Trial Court and that the omission was noticed when the First Appeal was posted for hearing and when they have discussed the matter with their counsel. No reasonable grounds are made out by the Appellants to admit the documents.

18. The provisions of O.41 R.27 C.P.C have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the Court of Appeal. In the decision reported in N.KAMALAM (DEAD) AND ANOTHER .. VS.. AYYASAMY AND ANOTHER (2001 (7) S.C.C. 503), the Supreme Court has held thus:-

> "...The provisions of Order 41 Rule 27 have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the Court of appeal – it does not authorise any lacunae or gaps in evidence to be filled up. The authority and jurisdiction as conferred on to the appellate court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way....".

The Appellants have also not alleged due diligence in placing the documents and that some could not be discovered despite search. As held by the Supreme Court, O.41 R.27 C.P.C cannot be invoked to patch up the weak points. Hence, the request of the Appellants to receive the additional documents cannot be considered.

19. Even if we consider the Kist Receipts as additional documents, they do not in any way cogently and consistently establish the plea of ouster set forth by the Defendants. The Suit was filed in February 1986. Most of the Kist Receipts – Documents 7 to 24 are produced only subsequent to the suit from 1986 – *Post Litam Stage*, which have no bearing. We do not propose to consider those Kist Receipts, which are *Post Litam Stage*.

20. Other Kist Receipts – Documents 1 to 6 are for the year 1973, 1978, 1980, 1984, 1985 and 1986 respectively. These Kist Receipts do not contain any seal. Further, these Kist Receipts relate to Patta Nos.1 and 53. No patta pass book is produced by the Defendants correlating these Kist Receipts with patta No.1 and 53. In the absence of patta pass book, we find it difficult to correlate the Kist Receipts with the suit properties. These Kist Receipts filed along with the Petition can neither be received nor looked up.

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21. Contending that the Kist Receipts are the public documents, learned counsel for the Appellants very much urged that the Public records have higher evidentiary value since the Public servant has recorded the same in discharge of his official duties. In support of this, learned counsel for the Appellants has relied upon the decision reported in MAHARAJA SIR KESHO PRASAD SINGH BAHADUR ..VS.. BAHURIA MT.BHAGJOGNA KUER AND OTHERS (A.I.R. 1937 PRIVY COUNCIL 69) wherein it was held,

> "...Record of Rights – Evidentiary value – Entries are evidence of title because they are good evidence of possession – Entries made contrary to fact of possession carry little weight especially when entries are made as routine and without notice to parties. Entries made in such Government records as the Record of Rights are evidence of title mainly because they are good evidence of possession, but if contrary to the facts as to possession at the time they were made they carry little, if any, weight. This would be specially applicable to entries made by Tahsildar as of routine and without notice to any parties interested to oppose their being made..."

22. We have no quarrel over the above said proposition. Entry made by a Public Servant in Public or other official book, register or records is made relevant under Section 35 of the Indian Evidence Act, since the Public Servant makes it himself in the discharge of official duty. As discussed earlier, when the relevant Kist Receipts 1 to 5 are not proved to be relating to the suit properties, the same cannot be received as public documents under Sec.35 of the Indian Evidence Act, much less when the Kist Receipts are not even sealed. The documents sought to be adduced as additional documents cannot be accepted as additional evidence. Since in the instant case, Kist Receipts produced by the Appellants are not acceptable as additional documents, we do not propose to elaborately go into the question whether the Kist Receipts are public documents and the entry of which is made by the Public Servant in the discharge of his official duties.

23. The First Appeal has been filed in the year 1990. This petition is filed nearly 14 years after filing of the First Appeal. The Appellants has not made out any reasonable grounds for receipt of additional documents. The Kist Receipts produced along with the Petition do not in any way establish the ouster. In the aforesaid decision reported in N.KAMALAM (DEAD) AND ANOTHER ..VS.. AYYASAMY AND ANOTHER (2001 (7) S.C.C. 503), the Supreme Court has observed that the Court must always be cautious about the allowing of the Applications seeking to adduce additional evidence particularly in the form of oral evidence after a long interval between the decree and the application. The present application is made nearly 14 years after filing of the Appeal. As observed by the Supreme Court, in the aforesaid decision, the time-lag in the matter under consideration is

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enormous and the failure on the part of the Appellants to make out such application at the earliest point of time is not properly explained. At this distant point of time, the Petition to receive the additional documents cannot be accepted and the Petition is liable to be dismissed.

24. The Trial Court considered the evidence and the plea of the parties in the proper perspective. Learned Subordinate Judge has reached the correct conclusion that the suit properties are the joint family properties and that the Plaintiff is entitled to 1/9th share. The conclusion of the Trial Court is well balanced warranting no interference. This Appeal has no merits and is bound to fail.

25. A.S.No.226 of 1990:-

Therefore, the Judgment and Decree (dated 04.12.1989) of the Subordinate Judge, Thiruppur in O.S.No.80/86 are confirmed and this Appeal is dismissed. However, in the circumstances of the case and the relationship of the parties, there is no order as to costs. The connected C.M.P.No.15683 of 2004 is also dismissed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To:

1. The Subordinate Judge,
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   Coimbatore District.

2. The Record Keeper,
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